

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

RULE ON MOTIONS CONCERNING
MAIL PREPARATION CHANGES

Docket No. RM2016-6

**UNITED STATES POSTAL SERVICE COMMENTS ON PROPOSED RULES
FOR MOTIONS CONCERNING MAIL PREPARATION CHANGES**
(May 1, 2017)

Pursuant to Order No. 3827, the United States Postal Service hereby submits Comments on the Commission's revised proposed rule on the process for reviewing whether a mail preparation requirement announced by the Postal Service constitutes a change in "rates."¹ The revised proposed rule eliminates the procedural provisions proposed in the Commission's initial Notice of Proposed Rulemaking (NPRM) in this docket.² In their place, the Commission proposes that the Postal Service be required to publish notice of each mail preparation requirement change in a single, publicly available source, and affirmatively designate whether the mail preparation requirement change is a change in rates subject to 39 C.F.R. § 3010.23(d)(2).³ If raised by the Commission or challenged by a mailer, the Postal Service would further be required to demonstrate by a preponderance of the evidence that a mail preparation change does not constitute a change in rates.⁴

¹ 39 U.S.C. § 3622(d).

² Order No. 3827, Revised Notice of Proposed Rulemaking, PRC Docket No. RM2016-6, at 13-14 (March 27, 2017).

³ *Id.*

⁴ *Id.*

As an initial matter, the Postal Service urges the Commission to refrain from issuing a final rule in this proceeding until the United States Court of Appeals for the District of Columbia Circuit resolves the Postal Service's Petition for Review of Order Nos. 3047 and 3441.⁵ Notwithstanding the Commission's decision to deny its Motion to Suspend Proceedings in this docket,⁶ the Postal Service maintains that the revised proposed rule is no longer procedural in nature, and has become inextricably linked to the substantive standard that is the subject of that appeal.⁷

To the extent the Commission proceeds with this rulemaking, the Postal Service opposes the revised proposed rule. For the reasons set forth below, the Commission should reinstate the 30-day filing deadline for motions challenging the Postal Service's initial determination that a mail preparation change does not implicate the price cap, adopt the additional procedural provisions requested by the Postal Service in its initial Comments, and place the burden of proving "significant" mailer costs⁸ on the proponent that asserts that a particular mail preparation change constitutes a change in rates because it redefines a price cell. If the Commission nonetheless decides to place the burden of proof on the Postal Service, the Postal Service will need to develop a process

⁵ *United States Postal Serv. v. Postal Regulatory Comm'n*, No. 16-1284 (D.C. Cir. Filed Aug. 11, 2016).

⁶ Order No. 3879, Order Denying Motion, PRC Docket No. RM2016-6 (April 28, 2017); Motion of the United States Postal Service to Suspend Proceedings, PRC Docket No. RM2016-6 (Apr. 11, 2017), at 4 [hereinafter Motion to Stay].

⁷ In Order No. 3879, the Commission suggests that the Postal Service's decision not to seek a stay in response to the initial NPRM casts doubt on its Motion to Stay in response to the revised NPRM. PRC Order No. 3879 at 2 n.3. That position overlooks the key point articulated in the motion: that while "[a]s originally conceived, this rulemaking proceeding was procedural in nature and operated independently of the substantive standard," the same cannot be said for the revised proposed rule, which lacks any specific processes or procedures to facilitate the fair and efficient resolution of these challenges, and which revolves entirely around the task of meeting the substantive standard. Motion to Stay at 2-3.

⁸ Order No. 3047, Order Resolving Issues on Remand, PRC Docket No. R2013-10R, at 16-17 (Jan. 22, 2016).

for obtaining cost information from potentially impacted mailers in order to determine the amount of compliance costs that a given change might impose on the mailing community. This requirement adds inefficiency to the process of developing and evaluating mail preparation changes, and provides no assurance against post-implementation review. In addition, absent a filing deadline for submission of motions concerning mail preparation changes, the requirement that the Postal Service publish all such changes in a “single source” serves no relevant purpose. The Commission is obligated to consider and respond to the Postal Service’s comments and provide a meaningful explanation of any rule it ultimately chooses to adopt.

I. Introduction

On January 22, 2016, the Commission issued Order No. 3047, setting forth the standard it plans to use to determine when changes in mail preparation requirements implicate the price cap.⁹ On the same day, the Commission opened this docket, and issued an initial NPRM proposing to establish a procedure and timeframe by which interested parties may initiate proceedings to demonstrate that a mail preparation change implicates the price cap under that standard.¹⁰

On February 22, 2016, the Postal Service filed a Motion for Reconsideration of Order No. 3047,¹¹ which the Commission denied in Order No. 3441.¹² The Postal

⁹ *Id.*

¹⁰ Order No. 3048, Notice of Proposed Rulemaking on Motions Concerning Mail Preparation Changes, PRC Docket No. RM2016-6 (Jan. 22, 2016).

¹¹ Motion for Reconsideration of Order No. 3047, PRC Docket No. R2013-10R (Feb. 22, 2016) [hereinafter Motion for Reconsideration].

¹² Order No. 3441, Order Resolving Motion for Reconsideration of Commission Order No. 3047, PRC Docket No. R2013-10R (July 20, 2016).

Service subsequently filed a Petition for Review of Order Nos. 3047 and 3441 with the D.C. Circuit.¹³ The principal issues in the Petition for Review concern the substantive standard announced in Order No. 3047. The Postal Service argues in large part that the substantive standard does not satisfy the D.C. Circuit Court's interpretation, expressed in *U.S. Postal Service v. Postal Regulatory Commission*,¹⁴ of the permissible scope of the price cap, and is too vague to provide adequate guidance for future mail preparation changes.

Meanwhile, on September 2, 2016, the Postal Service filed Comments on the Commission's January 22nd NPRM.¹⁵ The Postal Service noted that the stated goals of the proposed rule – to “clarify and streamline” the procedure for challenging mail preparation changes under the price cap and to “avoid after-the-fact price cap determinations” – were “critically important” given the “staggering impact on the Postal Service's pricing flexibility” that can flow from a finding that a mail preparation change requires compliance with the price cap.¹⁶ The Postal Service supported the proposed 30-day filing deadline for motions challenging the Postal Service's initial determination that a mail preparation change does not implicate the price cap, and suggested additional procedural provisions, including expedited discovery and a specific timeline

¹³ *United States Postal Serv. v. Postal Regulatory Comm'n*, No. 16-1284.

¹⁴ 785 F.3d 740 (D.C. Cir. 2015).

¹⁵ United States Postal Service Comments on Proposed Rules for Motions Concerning Mail Preparation Changes, PRC Docket No. RM2016-6 (Sept. 2, 2016) [hereinafter USPS Initial Comments].

¹⁶ *Id.* at 3 (citing PRC Order No. 3048 at 3 and PRC Order No. 3441 at 11).

for resolving such motions, intended to “facilitate the fair and efficient resolution of these motions.”¹⁷

On March 27, 2017, the Commission issued a revised NPRM as Order No. 3827. In it, the Commission withdraws the rule proposed in the initial NPRM, including the 30-day filing deadline.¹⁸ In its place, the Commission would require the Postal Service to: (1) publish notice of all mail preparation changes in a single, publicly available source; (2) affirmatively designate whether each change does or does not constitute a change in rates subject to 39 C.F.R. § 3010.23(d)(2); and (3) if challenged by a mailer or the Commission, bear the burden of proving, by a preponderance of the evidence, that a mail preparation change is not a change in rates.¹⁹

The Postal Service opposes these changes. The Commission initiated this rulemaking to establish a streamlined process that would allow the Postal Service to implement mail preparation changes “with minimal disruption,”²⁰ and to “avoid after-the-fact price cap determinations.”²¹ Without acknowledging these stated objectives, or addressing the Postal Service’s suggestions, the revised proposed rule strips away all procedural provisions designed to help protect the Postal Service’s pricing and operational flexibility. In their place, the Commission would impose upon the Postal Service the burden of proving mailer costs, despite the fact that the Postal Service has no clear vehicle to obtain the information necessary to make such a determination. This

¹⁷ *Id.* at 4.

¹⁸ PRC Order No. 3827 at 13-14.

¹⁹ *Id.*

²⁰ PRC Order No. 3048 at 5.

²¹ PRC Order No. 3441 at 20.

requirement is inconsistent with basic principles of administrative and evidentiary law, and further undermines a core purpose of this rulemaking.

II. The Revised Proposed Rule Ignores a Primary Objective of the Rulemaking and Fails to Address Significant Concerns Raised by the Postal Service

To meet the stated objectives of this rulemaking, the Commission should reinstate the 30-day filing deadline for motions challenging the Postal Service's initial determination that a mail preparation change does not implicate the price cap, and adopt the additional procedural provisions requested by the Postal Service in its initial Comments. It is a fundamental requirement of administrative law that "an agency's exercise of its statutory authority [must] be reasonable and reasonably explained."²² In deciding among multiple courses of action, the agency has a corresponding responsibility to consider the "important aspect[s] of the problem," and to "cogently explain why it has exercised its discretion in a given manner."²³ An agency must also "respond meaningfully" to objections raised by the parties to a proceeding.²⁴ Conclusory statements alone do not suffice;²⁵ the agency's explanation must be clear enough that its "path may reasonably be discerned."²⁶

Order No. 3827 does not fulfill these basic obligations. By stripping the proposed rule of all procedural protections, the revised NPRM completely ignores a primary

²² *Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012); *see also Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("We have explained that a fundamental requirement of administrative law is that an agency must set forth its reasons for decision; an agency's failure to do so constitutes arbitrary and capricious agency action.") (internal citations omitted).

²³ *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43, 48 (1983).

²⁴ *PSEG Energy Res. & Trade LLC v. Fed. Energy Regulatory Comm'n*, 665 F.3d 203, 208 (D.C. Cir. 2011).

²⁵ *Amerijet Int'l*, 753 F.3d at 1350 (internal citations omitted).

²⁶ *State Farm*, 463 U.S. at 43.

objective of this rulemaking, namely, to establish a streamlined procedure for resolving whether mail preparation changes proposed by the Postal Service implicate the price cap. The Commission's explanation for omitting procedural protections designed to achieve that objective ignores the statutory criteria, the significant concerns raised by the Postal Service, and the Commission's own prior statements about the goal to protect the Postal Service's operational and pricing flexibility.

A. The Revised NPRM Strips the Proposed Rule of All Procedural Protections Designed to Mitigate the Risk of Unpredictable, After-the-Fact Applications of the Price Cap.

The Postal Service maintains that uncertainty under the substantive standard about the price cap effects of future mail preparation changes will severely restrict, and threaten to delay, the implementation of efficiency-enhancing mail preparation changes.²⁷ This uncertainty also will undermine the ability of the Postal Service to develop its pricing proposals in time for Governor review.²⁸ This concern directly implicates the statutory objectives under 39 U.S.C. § 3622(b), including (but not limited to) maximizing efficiency (objective 1) and allowing the Postal Service pricing flexibility (objective 4).²⁹ Acknowledging this in the context of the parallel proceedings on the substantive standard, the Commission assured the Postal Service that it will be

²⁷ *E.g.*, Motion for Reconsideration at 5-9, 23-24, 46-47.

²⁸ Under the current system for regulating Market-Dominant prices, a close estimate of available price cap space is a basic requirement for determining prices. Moreover, because of the way that price cap usage is calculated under the Commission's present rules, mail preparation changes can have a disproportionately large price cap impact. For example, the Full-Service IMb proposal would not only have used all price cap space in First-Class Mail and Standard Mail, but would have required a price decrease in those classes. See *id.* at 46-47.

²⁹ The Commission has acknowledged as much. For example, in denying the Postal Service's Motion for Reconsideration, the Commission defended its position that the substantive standard "is supported by objective 1 where it allows the Postal Service to continue improving the efficiency of its operations with minimal administrative burden" in part by pointing to procedural protections that would be established in this rulemaking. PRC Order No. 3441 at 19-20.

protected “from future impromptu and unpredictable challenges to its handling of mail preparation requirements with regard to the price cap.”³⁰

In fact, the Commission has repeatedly pointed to procedural limitations that would be established in this proceeding in order to allay the Postal Service’s concern. At various moments in both the substantive proceedings and this docket, the Commission has stated that this rulemaking would be a source of forthcoming “structure and certainty,”³¹ would “avoid after-the-fact price cap determinations by establishing a procedure to resolve those questions prior to implementation of the mail preparation requirement,”³² and would “allow the Postal Service to implement mail preparation changes with limited disruption.”³³ The Commission has been nothing if not consistent in its message that the Postal Service should expect this rulemaking to include procedural provisions that provide some certainty to the process of determining which mail preparation changes implicate the price cap.

With respect to the 30-day period for mailer challenges in particular, as early as its announcement of the substantive standard in Order No. 3047 the Commission anticipated that time limits would be a primary feature of this proposed rule³⁴ and has at various times since expressed the judgment that a deadline for mailer challenges should be included in the procedure. In Order No. 3441, the Commission stated that:

³⁰ *Id.* at 21.

³¹ *Id.* at 11 n.6.

³² *Id.* at 20.

³³ PRC Order No. 3048 at 5.

³⁴ PRC Order No. 3047 at 21 (“The Commission will institute a rulemaking proceeding to create rules for the process and timeframes for the regulation of mail preparation requirement changes.”).

[T]he rulemaking initiated in Docket No. RM2016-6 was intended to address the Postal Service's concerns of unpredictability of how mail preparation changes would be handled by creating a procedure and timeframe by which mailers must file a motion with the Commission concerning certain mail preparation changes.³⁵

The Commission confirmed its position in its initial NPRM:

In light of the complexity of administering the price cap, the timeframe set forth in the proposed rule is intended to promote certainty for the Postal Service and users of the mail when making operational changes.³⁶

It is clear, moreover, that the Commission viewed the filing deadline as a mechanism to mitigate the impact that an unpredictable application of the cap would have on the Postal Service's operational and pricing flexibility:

The proposed rule is not intended to stay implementation of any mail preparation change required by the Postal Service, rather it is intended to set forth a reasonable timeframe by which users of the mail may file a motion with the Commission where such mail preparation changes may have rate effects.³⁷

The Postal Service supported the 30-day filing deadline in its initial Comments and reiterated that "the Postal Service generally must know the outcome of a mail preparation motion before going forward with its pricing plans."³⁸

Despite these statements, and without meaningful explanation, the Commission's revised proposal strips the rule of its critical procedural protection: the 30-day filing deadline. The Postal Service maintains that a filing deadline for challenges to mail preparation requirements is a critical minimum for protecting its pricing and operational flexibility. If mailers are permitted to raise objections to mail preparation changes under

³⁵ PRC Order No. 3441 at 21.

³⁶ PRC Order No. 3048 at 3.

³⁷ *Id.* at 5.

³⁸ USPS Initial Comments at 7.

the substantive standard at any time, regardless of how much time has passed since the Postal Service provided notice of the change or the stage of implementation that the change is in, then the present rulemaking completely fails to protect against unpredictable impacts on the Postal Service's pricing authority. The revised NPRM thus reinforces, rather than addresses, the Postal Service's concern about its ability to decide whether to move forward with changes that improve operational efficiency in the face of potential after-the-fact price cap impacts,³⁹ and puts the statutory objectives of efficiency and pricing flexibility in serious jeopardy.

In attempting to provide a rationale for stripping the procedural provisions from the proposed rule, the Commission states that its existing procedures "should be sufficient to raise issues of price cap compliance for mail preparation changes," that creating additional procedures would be "redundant," and that the revised proposed rule is meant "to better target the specific goal of ensuring that the Postal Service properly accounts for mail preparation requirement changes under § 3010.23(d)(2)."⁴⁰ However, none of these statements explains how the revised proposed rule comports with the statutory criteria and addresses the Postal Service's concerns about predictability, or acknowledges the Commission's prior statements explaining that the goal of this proceeding would be to allay those concerns. While a procedure for resolving the rate effect of mail preparation changes prior to their implementation does not fully achieve the goal of protecting its operational and pricing flexibility, the procedural provisions proposed by the Postal Service in its initial Comments, in addition to the 30-day filing

³⁹ See e.g., Motion for Reconsideration at 46-47.

⁴⁰ PRC Order No. 3827 at 10-11.

deadline, are critical minimum elements of any rule resulting from this proceeding. In developing and ultimately adopting a final rule, the Commission must provide a cogent and reasonable explanation of how that rule fulfills the statutory criteria and addresses these concerns.

B. The Revised NPRM Does Not Meaningfully Address the Critical Procedural Protections Requested by the Postal Service.

In its Comments, the Postal Service not only supported the 30-day filing deadline, but argued that the Commission should adopt additional provisions that “would enhance the rule’s ability to facilitate the fair and efficient resolution of these motions.”⁴¹ The Postal Service specifically suggested the following additions:

- Procedures for expedited discovery to allow for the development of an adequate evidentiary record of mailer costs. In particular, the Postal Service suggested a requirement that the movant file with its initial motion the complete evidentiary basis for its claim, and authorization for the Postal Service to engage in discovery, including third-party discovery.
- A 60-day timeline within which the Commission will resolve motions challenging mail preparation changes under these procedures.
- A pre-filing meet and confer requirement.⁴²

As the Postal Service explained in its Comments, these provisions are essential to preserving due process and enabling the expeditious and informed resolution of claims that a mail preparation change constitutes a change in rates.⁴³

The new proposed rule, however, fails to incorporate any of these changes. Nor does the Commission provide a reasoned explanation of why it would decide not to

⁴¹ USPS Initial Comments at 4.

⁴² *Id.* at 4-9.

⁴³ *Id.*

adopt them in the final rule. The revised NPRM contains little more than a restatement of objections raised by other commenters in this proceeding, including concerns about the Commission's authority to independently review mail preparation changes for compliance with the price cap, and about the creation of an exclusive procedure for challenges by interested parties.⁴⁴ Beyond that, the closest the Commission comes to explaining its reasoning on this question is the following discussion:

Single source publication will allow the Commission to independently review mail preparation changes and will, in most circumstances, eliminate the need to have parties initiate motions to bring such changes to the Commission's attention. Accordingly, the revised proposed rule eliminates the separate procedural component for motions concerning mail preparation changes. This change was triggered by commenter concerns over a potentially duplicative procedural rule that would conflict with the Commission's existing procedures and authority to review mail preparation changes for compliance with the price cap rules. The Commission submits that the existing procedures available to interested parties should be sufficient to raise issues of price cap compliance for mail preparation changes.⁴⁵

The Postal Service simply cannot discern on the basis of this discussion, or the revised NPRM as a whole, whether the Commission considered the substance of its requests and, if so, what reasons it had for denying them.⁴⁶

For instance, the revised NPRM does not contain any analysis of the Postal Service's specific and well-defined suggestions. The Commission is obligated to give these proposed alternatives meaningful consideration.⁴⁷ Moreover, to the extent the revised NPRM suggests that single-source publication obviates the need for such

⁴⁴ PRC Order No. 3827 at 10-11.

⁴⁵ *Id.* at 10.

⁴⁶ *Amerijet*, 753 F.3d at 1352.

⁴⁷ *State Farm*, 463 U.S. at 46-51; *PSEG*, 665 F.3d at 210; *Am. Gas Ass'n v. Fed. Energy Reg. Comm'n*, 593 F.3d 14 (D.C. Cir. 2010).

procedural provisions, the Commission's logic is not self-evident. It is not clear how requiring a single source of publication fulfills the need to provide for the expeditious and informed review of challenges to mail preparation changes, or otherwise avoids after-the-fact applications of the price cap. Nor is there an obvious reason why concerns about "a potentially duplicative procedural rule"⁴⁸ conflicts with the establishment of an exclusive procedure for challenging mail preparation changes under the price cap. To the contrary, channeling these disputes into a streamlined and time-limited process that provides for the development of an adequate evidentiary record would seem to avoid redundancy. The Postal Service likewise struggles to understand how establishing a streamlined and dedicated procedure to resolve, prior to implementation, challenges brought by interested parties in any way jeopardizes the Commission's authority to independently review mail preparation changes. Indeed, the Commission's statement that single-source publication "will allow the Commission to independently review mail preparation changes"⁴⁹ seems to contradict that very notion.

Finally, the Commission continues to ignore significant questions about what costs are relevant to the "significance" test under the substantive standard. Is the relevant inquiry the costs incurred by a single mailer or costs incurred by mailers collectively? Absent indication to the contrary, the Postal Service presumes that the focus of the inquiry is on collective industry compliance costs, rather than the costs

⁴⁸ PRC Order No. 3827 at 10.

⁴⁹ *Id.*

carried by the particular mailer that happens to file a challenge.⁵⁰ Also unclear is whether relevant costs are incurred on a one-time or a recurring basis. These and related questions, which the Postal Service has asked on numerous occasions,⁵¹ raise “important aspect[s] of the problem” – namely, the evidentiary showing required in these proceedings – that the Commission has a responsibility to consider.⁵²

In sum, the revised NPRM strips the proposed rule of any procedural provisions to protect against price cap uncertainty as the Postal Service prepares price changes, as well as unpredictable, post-implementation applications of the price cap. The Commission should reinstate the 30-day filing deadline and adopt the Postal Service’s proposed procedural provisions, or provide adequate reasons for pursuing an alternative approach.

III. Assigning the Burden of Proof to the Postal Service is Inconsistent with Accepted Principles of Administrative and Evidentiary Law and Fails to Address Concerns about the Substantive Standard’s Lack of Clarity.

In place of the procedural provisions discussed above, the Commission’s revised proposed rule would require the Postal Service to bear the burden of affirmatively determining whether a mail preparation change constitutes a change in rates under the Commission’s substantive standard. If a mail preparation rule change is challenged by a mailer, or raised by the Commission, “the Postal Service would have to demonstrate by a preponderance of the evidence that [the] mail preparation change does not require

⁵⁰ The Postal Service maintains that the substantive standard is ill-defined and that the costs mailers may incur in order to comply with a mail preparation change should not, standing alone, dictate whether such a change constitutes a *de facto* rate increase. USPS Initial Comments at 5.

⁵¹ *Id.* at 6; Motion for Reconsideration at 38-41.

⁵² *State Farm*, 463 U.S. at 43.

compliance with 39 C.F.R. § 3010.23(d)(2).⁵³ In other words, the Postal Service would be placed in the peculiar position of proving a negative: that is, that a mail preparation change does not impose “significant” costs and operational adjustments on mailers sufficient to constitute a change in rates under the Commission’s standard. This position would be all the more peculiar in light of the fact that the Postal Service would be neither the proponent of the challenge nor the party with direct access to the information that might be offered to prove that the change does impose “significant” costs and operational burdens on mailers. The Postal Service’s ability to meet its burden would be entirely at the discretion of mailers whose interest is entirely against helping the Postal Service do so. Such a burden is unique among the Commission’s rules and is inconsistent with principles of administrative and evidentiary law. Assignment of the burden to the Postal Service also highlights the concerns the Postal Service has raised about the substantive standard announced in Order No. 3441.

A. The Party Moving to Challenge a Mail Preparation Change Should Bear the Burden of Proving that it is a Change in Rates Subject to the Price Cap.

It is a widely accepted legal principle that the movant (the party seeking a ruling or order) bears the burden of proof.⁵⁴ The Commission is undoubtedly familiar with this bedrock legal principle, as it has previously acknowledged the need for interested parties challenging Postal Service decisions to “provide the requisite support for their position.”⁵⁵ This principle is also articulated in the Commission’s general rules of

⁵³ PRC Order No. 3827 at 8.

⁵⁴ See, e.g., Am. Jur. 2d Administrative Law § 360 (stating that “Generally, the burden of proof is on the party asserting the affirmative issue . . .”).

⁵⁵ Order No. 1366, Order on Motion to Dismiss Holding Complaint in Abeyance Pending Further Proceeding, PRC Docket No. C2012-1 (June 13, 2012), at 14-15 & n.18.

practice, which require the moving party to “set forth with particularity the . . . grounds and basis” for the ruling or relief sought.⁵⁶ The Commission’s procedures for complaints raised under 39 U.S.C. § 404a similarly provide that the complainant “must show that a Postal Service rule, regulation, or standard” precludes competition or establishes the terms of competition.⁵⁷

The fact that the Commission’s own procedural rules and complaint procedures reiterate this standard of proof only highlights the peculiarity of the Commission’s departure from it in its revised proposed rule. At the core of the Commission’s decision to assign the burden of proof to the Postal Service is the apparent belief that the Postal Service would be the “proponent” seeking a ruling from the Commission that its determination was correct.⁵⁸ However, once the Postal Service determines that a mail preparation requirement is not a change in rates, the Postal Service is not the proponent of any Commission order or determination, because mail preparation requirements that do not fall under the Commission’s substantive standard are not subject to the Commission’s rate review. Instead, the party filing a motion seeking a Commission determination that the mail preparation requirement is a change in rates would be the proponent in this context. By eliminating the procedural mechanism proposed in the initial NPRM that would have created a streamlined procedure for interested parties to submit motions concerning mail preparation changes, and instead placing the burden on the Postal Service to prove the negative proposition that any motions challenging its price cap determinations should not be granted, the Commission

⁵⁶ 39 C.F.R. § 3001.21(a).

⁵⁷ *Id.* § 3032.5(a).

⁵⁸ See Order No. 3827 at 9.

has turned well-accepted principles of motions practice and evidentiary procedure on their heads.

Significantly, the Commission states in the revised NPRM that “any motions” concerning mail preparation changes that are filed under its existing procedural rules for motions “shall provide all information the mailers have to rebut the Postal Service’s determination” that the change is not subject to the price cap.⁵⁹ This statement would reasonably support the inference that the Commission believes the Postal Service’s initial determination should enjoy some level of deference when challenged. After all, as the Postal Service has pointed out, the Commission does not regulate or oversee mailers’ costs, and so it cannot credibly claim any expertise of its own on the subject.⁶⁰ Indeed, the Commission’s own decisions enjoy such deference when challenged by mailers or by the Postal Service.⁶¹ Requiring motions challenging mail preparation changes to include any information the party has to rebut the Postal Service’s initial determination would also be consistent with the evidentiary principle that the party with superior access to relevant information should bear the burden of producing that evidence. The D.C. Circuit summarized things best when it stated: “When certain material ‘lies particularly within the knowledge’ of a party he is ordinarily assigned the burden of adducing the pertinent information. This assignment of burden to a party is fully appropriate when the other party is confronted with the often-formidable task of establishing a ‘negative averment.’”⁶² Indeed, it would be perverse to require the Postal

⁵⁹ *Id.* at 10.

⁶⁰ Motion for Reconsideration at 37-38.

⁶¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁶² *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 643 (D.C. Cir. 1973) (citations omitted).

Service to prove something for which the only evidence lies with parties whose interests run against helping the Postal Service do so.

The “formidable task” described by the D.C. Circuit is exactly the task the Commission has laid at the Postal Service’s feet. Notwithstanding the Commission’s acknowledgment in Order No. 3827 that a challenging party should provide relevant evidence to rebut the Postal Service’s initial determination that the price cap does not apply,⁶³ the new rule proposed in the revised NPRM fails to codify any such requirement. The result is that under Proposed Rule 3010.23(d)(5), not only would the Postal Service bear the affirmative burden of proving that a mail preparation change does or does not constitute a change in rates under the standard currently before the D.C. Circuit, it would also face the task of disproving any evidence presented by a mailer challenging its initial determination, without the benefit of discovery or any other procedure designed to ensure that the party challenging the mail preparation rule change is put to its proof. What is more, the Postal Service would have to accomplish this task within the narrow seven-day response period provided under 39 C.F.R. § 3001.21(b). To satisfy a preponderance-of-the-evidence standard, the Postal Service would most certainly need more than seven days to evaluate the evidence presented by the challenging party and to collect sufficient information to present in rebuttal. The Postal Service accordingly urges the Commission to revise the proposed rule by placing on the mailer the burden of proving that the costs of complying with the mail preparation requirement are “significant” such that the requirement constitutes a change in rates.

⁶³ PRC Order No. 3827 at 10.

B. The Revised NPRM's Burden-of-Proof Provision Fails to Address Significant Concerns About the Substantive Standard's Lack of Clarity.

Even if the Commission could permissibly saddle the Postal Service with the burden of proving that a planned mail preparation change is not a change in “rates” subject to the price cap, the Commission still leaves the Postal Service guessing about how it is supposed to carry that burden. Whatever the Commission might think of the adequacy of its pronouncements to date, the Postal Service’s Petition for Review of Order Nos. 3047 and 3441 attests to the Postal Service’s lack of clarity about the Commission’s standard. It is manifestly unfair to compel the Postal Service to bear the burden of meeting a standard that remains inscrutable to it. Before assigning the Postal Service the burden of meeting a substantive standard, the Commission must clarify what that standard means in practice and what evidence would satisfy it. Once again, if the Commission persists in using this rulemaking to dictate burdens of proof rather than merely to establish procedures, then it should suspend further work on the rulemaking until the D.C. Circuit has completed its review of the substantive standard.

In *U.S. Postal Service v. Postal Regulatory Commission*, the D.C. Circuit concluded that the language of 39 U.S.C. § 3622(d)(1) was sufficiently ambiguous that it could be read to give the Commission “some authority,” but not “unfettered authority,” to treat changes to mail preparation requirements as “rate” increases.⁶⁴ In particular, the court held that, because the purpose of the price cap is to prevent the Postal Service from “charg[ing] customers unreasonably high prices” for its services, the Commission could use the price cap to prevent the Postal Service from manipulating its mail

⁶⁴ *United States Postal Serv. v. Postal Regulatory Comm’n*, 785 F.3d at 753.

preparation requirements in order to shift mailpieces into higher rate categories or otherwise force mailers to pay higher prices.⁶⁵ On remand, the Commission announced that a mail preparation change is subject to the price cap where it either functionally “eliminates” a rate or “redefines” a rate cell by forcing mailers to incur “significant” costs and operational adjustments.⁶⁶ But the Commission has not explained how that standard comports with the D.C. Circuit’s interpretation of the price cap as addressing only those limited situations when a mail preparation change will force mailers to pay higher prices.

In fact, several recent Commission statements suggest that there exists considerable tension between the Commission’s standard and the D.C. Circuit’s interpretation of the price cap’s permissible scope. For example, Order No. 3827 maintains that a mail preparation change is subject to the price cap when it functionally “eliminates” a rate.⁶⁷ However, the Commission’s brief in the D.C. Circuit acknowledged that the elimination of a rate does not address whether mailers will be forced to pay higher prices.⁶⁸ Similarly, as for the “redefinition” prong, Order No. 3827 maintains that a mail preparation change is subject to the price cap when it forces mailers to incur compliance costs that are “large in magnitude.”⁶⁹ However, the Commission has conceded that the amount of compliance costs that mailers will incur

⁶⁵ *Id.* at 746, 751.

⁶⁶ PRC Order No. 3047 at 15-20.

⁶⁷ PRC Order No. 3827 at 9.

⁶⁸ *U.S. Postal Serv. v. PRC*, No. 16-1284, PRC Br. at 24 (D.C. Cir. filed Mar. 8, 2017).

⁶⁹ PRC Order No. 3827 at 9. *Accord* PRC Order No. 3047 at 19 (the Postal Service changes “rates” where it imposes “significant” costs on mailers); PRC Order No. 3441 at 30-32 (same).

does not answer, and is not even designed to answer, the question of whether a mail preparation change will force mailers to pay higher prices in lieu of incurring such compliance costs.⁷⁰

In short, Order No. 3827 appears to be premised on the expectation that the standard announced in Order No. 3047 is clearly understood, yet subsequent Commission statements have cast even more confusion upon that standard than existed at the outset. Moreover, the Commission's standard remains too vague to serve as an adequate guide for how the Postal Service could determine and prove that future mail preparation changes are not subject to the price cap. The Commission has repeatedly declined to specifically delineate or quantify the point at which mailer costs collectively become sufficiently "significant" to constitute a change in "rates" subject to the price cap, stating that whether a change is significant "cannot be pre-determined with absolute precision," and "cannot be answered with a bright-line rule."⁷¹ At the same time, however, it assured the Postal Service that, because of the Commission's "technical expertise and experience," it was in a "unique position" to assess the significance of a change to the mailing industry,⁷² and it represented to the D.C. Circuit that it could make such a determination without a detailed evidentiary showing because of "the Commission's expertise in evaluating mail preparation changes and its understanding of what mailers do and expect from the Postal Service for various

⁷⁰ *U.S. Postal Serv. v. PRC*, No. 16-1284, PRC Br. at 34 (conceding that its "redefinition" test "is not designed to predict mailer behavior," but is instead "designed to identify situations in which the mailer is getting less for the same amount of money"); *id.* at 28 ("redefinition" test addresses circumstances where a mail preparation change "requires mailers to change their operations in a significant manner and bear substantial costs").

⁷¹ PRC Order No. 3047 at 3, 17.

⁷² *Id.* at 19.

products.”⁷³ In other words, the Commission has intimated to both the Postal Service and the D.C. Circuit that it knows precisely the type of information it needs to see and can readily resolve whether a mail preparation change implicates the price cap.

In Order No. 3827, however, the Commission disclaims any purported expertise in assessing the costs imposed by mail preparation changes, concluding instead that “the Postal Service is in the best position to gather information on mailer costs and operational adjustments, in light of its abundant contact and consultation with the mailing industry.”⁷⁴ And it retreats from its earlier suggestion that an evidentiary proceeding would not be needed, stating that, if a mailer or the Commission questions whether a mail preparation change implicates the price cap, the Postal Service must “show that the greater weight of the available evidence favors a finding that the change does not implicate § 3010.23(d)(2),” and that “the specific evidence presented will be largely fact dependent subject to the individual circumstances of the matter.”⁷⁵ These statements only highlight the need for the Commission to clarify what, exactly, it is asking the Postal Service to prove.

Instead of providing such clarity, the Commission simply states that, if a mailer or the Commission questions whether a mail preparation change should be reviewed under the price cap, the Postal Service must show that “the greater weight of the available evidence” undermines such a challenge.⁷⁶ As the Postal Service has emphasized previously, the Postal Service does not have comprehensive, verifiable

⁷³ *U.S. Postal Serv. v. PRC*, No. 16-1284, PRC Br. at 33.

⁷⁴ Order No. 3827 at 9.

⁷⁵ *Id.*

⁷⁶ *Id.*

information concerning the costs that any given mail preparation change will collectively impose on impacted mailers.⁷⁷ Only the mailers themselves have such information,⁷⁸ and their interest does not lie in helping the Postal Service justify retaining greater pricing authority. Like the Commission, therefore, the Postal Service must rely on impacted mailers to come forward with evidence concerning the extent of compliance costs that a mail preparation change will impose, and without any defined process to insure that they do so accurately and completely. The Commission's proposal does not meaningfully address that problem. Its suggestion that the Postal Service can submit evidence to the Commission under the "procedures set forth under § 3001.21 of this chapter prior to implementation of the change" ignores the fact that the Postal Service cannot submit evidence that it does not have, and has no mechanism at present by which such evidence may reliably be obtained.

Passing the fact-gathering burden onto the Postal Service (and without providing it with any tools to do so) would undermine the purposes that gave rise to the instant rulemaking. As discussed in Section II above, the Commission initiated this rulemaking to establish a "streamlined" process that would allow the Postal Service to implement mail preparation changes "with minimal disruption," and that would not stay implementation of a mail preparation change that is the subject of a motion.⁷⁹ The Commission's original proposal of a 30-day timeframe for mailers to claim that a mail

⁷⁷ See Motion for Reconsideration at 33-37.

⁷⁸ In its Motion for Reconsideration, the Postal Service contested the notion that it or the Commission possesses the requisite information to assess, on the basis of its standard experience or expertise, the impact of a mail preparation change on the mailing industry. *Id.* at 36-38. The Commission has yet to expressly address this concern.

⁷⁹ PRC Order No. 3048 at 5.

preparation change implicated the price cap furthered that purpose in part, and the Postal Service made some additional recommendations that would have more fully served those purposes, such as requiring mailers to submit proof of their compliance costs when challenging a mail preparation change, establishing a specific period for discovery, and requiring the Commission to resolve such challenges within a limited period of time. Without even addressing the Postal Service's suggestions, however, Order No. 3827 now proposes to strip away the one temporal limitation that its previous rule would have imposed and to replace it with an additional administrative layer that will only prolong the resolution of challenges to mail preparation changes.

Under the Commission's standard, whether a mail preparation change implicates the price cap depends on the amount of compliance costs that a mail preparation change will impose on mailers impacted by the change. In order to gather the data to address that issue, the Postal Service will presumably have to develop procedures for assembling cost information from potentially impacted mailers – both those that claim that the mail preparation change should be deemed a change in “rates” and those that do not. The Postal Service will also need to develop a mechanism for determining whether the substantive standard is satisfied – that is, whether the costs collectively imposed on mailers are sufficiently “significant” so as to subject the mail preparation change to scrutiny under the price cap. There is nothing “streamlined” about such a procedure.

Even if the Postal Service were to develop processes to implement the Commission's substantive standard, moreover, the Commission offers no assurance that it will not later second-guess the conclusion that the Postal Service reaches. Even

though the Commission has delegated to the Postal Service the tasks of gathering information for the initial determination of compliance with the Commission's substantive standard, it still retains the power to subject the Postal Service's conclusions to *post hoc* review, without articulating how it would undertake such review. It was largely this lack of predictability that caused the D.C. Circuit to remand Order No. 1890 to the Commission in the first place.⁸⁰

IV. The Commission's Proposed Rule 39 C.F.R. § 3010.23(d)(5) Serves No Relevant Purpose.

Under the Commission's revised proposal, the Postal Service would be required to publish all mail preparation changes in a publicly available "single source," and affirmatively designate in each notice whether or not the change requires compliance with the price cap.⁸¹ It is unclear what procedural purpose would be served by these new requirements, since the revised NPRM abandons the procedural mechanism proposed in the initial NPRM that would have required interested parties to file any motions concerning mail preparation changes within 30 days of receiving notice of the change. Mailers would no longer be bound by a deadline to submit challenges, and the Commission already has ample opportunities to review Postal Service compliance with the price cap via price adjustment dockets, the Annual Compliance Determination, and other proceedings. In short, the new requirements are a solution in search of a problem.

⁸⁰ *United States Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d at 755 (noting that an indiscriminate standard "could have far-reaching and enormous consequences for the day-to-day and month-to-month operations of the Postal Service, including its ability to reasonably manage its own policies").

⁸¹ PRC Order No. 3827 at 2, 13.

The Postal Service already has strong business incentives to provide advance notice of upcoming changes, to help ensure that mailers can and will comply with any new requirements in a timely manner. As noted by the Commission and by several commenters on the initial NPRM, the Postal Service and the mailing industry have collaborated to develop many communications touchpoints with each other.⁸² There is no “one” source that every mailer uses for every purpose. In many instances, advance communication of upcoming changes is both welcomed and specifically requested by mailers, in a variety of channels that can vary based on the mailer. To cite just a few examples, the Postal Service often communicates proposed or upcoming changes at industry events such as Mailers Technical Advisory Committee (“MTAC”) meetings and the National Postal Forum, but not every mailer attends these events. The Postal Service also shares information of interest to the mailing industry in publicly available sources such as its biweekly *Postal Bulletin* and the *Federal Register*, but these publication channels cover a wide variety of information, most of which is unrelated to mail preparation changes. None of the commenters appears to suggest that these or any other existing communications channels should be eliminated, or that the Postal Service routinely fails to provide notice to the mailing community of upcoming changes. Indeed, in the very proceedings that gave rise to this rulemaking, the Postal Service provided nearly two years of advance notice concerning changes to Full-Service

⁸² See *id.* at 6-7 (summarizing comments received on the Initial NPR); Comments of the Association for Postal Commerce, PRC Docket No. RM2016-6 (Sept. 2, 2016) (“PostCom Comments”); *id.* at 2-3 (describing some of the sources through which the Postal Service communicates upcoming mail preparation changes).

Intelligent Mail barcode (IMb) requirements.⁸³ Notice was not the source of the disagreement between the Postal Service, the Commission, and the mailers challenging the IMb requirements; disagreement as to the substantive impact of the changes and their relevance to the price cap was the issue.⁸⁴ Nor has any party complained that its ability to dispute the price-cap effects of mail preparation requirement changes has been hampered by where and how the Postal Service gave notice of the relevant changes. The Commission should decline to adopt the proposed “single source” publication requirement.

V. Conclusion

The Postal Service respectfully requests that the Commission consider these Comments in promulgating any final rules for motions concerning mail preparation changes.

⁸³ Advance Notice of Implementation of Full-Service Intelligent Mail Required for Automation Prices, 77 Fed. Reg. 23,643 (Apr. 20, 2012).

⁸⁴ See Order No. 1890, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, PRC Docket No. R2013-10 (Nov. 21, 2013), at 5-37.

Respectfully submitted,

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